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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 26

HENRY ANTON PFISTER, *Petitioner*,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, et al.

No. 27

HENRY ANTON PFISTER, *Petitioner*,

vs.

NORTHERN ILLINOIS FINANCE CORPORATION, ALGONQUIN STATE BANK, HARTMAN AND SON, et al.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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SUBJECT INDEX

to revive and extend the right to review, District Court correctly dismissed such petitions for review."

Page 49: "IV Order of September 7, 1940, are consent orders. No appeal or review thereof by petition for review can be had therefrom."

Page 54. "V Order of August 13, 1940, is a consent order. No appeal or review by petition for review can be had thereunder.") 41

TABLE OF CASES.

Statutes Listed.

Authorities Cited.

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Preliminary Statement.

In this reply brief counsel for the petitioner will eschew any reference to the several aspersions which are found through the Respondents' brief and confine it to the appropriate issues.

All emphasis in this reply brief is supplied unless otherwise noted.

References herein to the "Supplemental Brief" are to the separate brief of 53 pages, containing discussions of cases alphabetically arranged and numbered from No. 1 to No. 67.

The Order of This Reply Brief.

This reply brief will reply to the respondents' brief in the same order of that brief, using the paging of the respondents' brief as headings.

Reply to Respondents' Brief Page 2.

(Under Heading "Concise Statement of Facts")

At the bottom of page 2 of respondents' brief, "September 28, 1940" is evidently a typographical error. The farmer debtor's petition was filed **February** 28, 1940. R. 2, R. 14.

Respondents' Brief Pages 3 to 15.

(The remainder of the Heading "Concise Statement of Facts")

As to the remainder of the respondents' "Concise Statement of Facts" appearing on pages 3 to 14, many statements appear there which are considered to be erroneous. As they are repeated in the respondents' "Argument," they will be noticed under that heading of this reply brief.

REPLY TO RESPONDENT'S "ARGUMENT"

beginning at page 14 of Respondent's Brief.

Paragraph numbered 1 at the top of page 15 of

(Under the Headings: "A. General Nature of Orders." "1. Their relation to substantive rights.")

Paragraph numbered 1 to the top of page 15 Respondents' Brief.

The respondents' brief says that the farmer debtor's petition stated that his moratorium began running on April 26, 1940, which date preceded the stay order by nearly four months. It is true his petition contained that erroneous statement.

But Section 75 (s) (2) without qualification makes the three year stay run for a period of three years after all the "conditions set forth in this section have been complied with" (that is, after the appraisal and setting off of exemptions) and that "during such three years the debtor shall be permitted to retain possession." It is suggested that the farmer debtor could not by his pronouncement foreshorten this statutory mandate. In *Borchard* v. *California Bank*, 310 U. S. 311, the stipulations of the farmer debtor and the mortgage holder embodied in orders of the bankruptcy court were not permitted to override this provision.

But the present importance of the **foreshortened stay period of 2 years, 8 months and 13 days** is in relation to the the total rental and additional payment orders to pay $12,750 within that time.

Paragraph numbered 2 and 3 at the Middle of Page 15 of Respondents' Brief.

The respondents' brief says that "debtor now complains of the amount of the rent" and that the rent and principal payment orders were entered "pursuant to his own suggestion and within the limits of his consent."

The record, at R. 9, entry of August 13, shows that on August 13, three of the respondents moved that rental and principal payments be ordered totaling $12,750, to be paid in certain installments which they also named. **Reference is made to the rental order at R. 75 and 76 where the installments and the totals are seen to be identical with the respondents' motion** noted at R. 9 in the entry of August 13.

The record at R. 9, entry of August 13, also shows "hearing on motion; motion allowed as per order (Dft). **Objection by debtor,** hearing thereon and objection overruled."

Thus the record shows the order of August 13 fixed $12,750 rent and extra payments **precisely as respondents moved,** and over the objection of the farmer debtor. Nowhere in the order of August 13, found at R. 72 to 77 is there any consent by the farmer debtor. But even if he had "consented," we think the order is shocking and so not beyond review.

The Unnumbered paragraphs on Page 16 of Respondents' Brief.

Respondents' brief says an order was entered that the farmer debtor be prevented from removing soil or personal

property and to account to the conciliation commissioner for sale of farm produce. If such an order was entered, it is not in issue. But no such order is in the record anywhere. At R. 7, referred to by respondents' brief, Entry of June 29, there is noted a motion to the effect stated. But no order is noted, and the entry says "Hearing on all motions continued". The later entries contain nothing further on the subject. At R. 158 and 159, the conciliation commissioner said in his opinion and decision on the petition for rehearing of the order of August 13 that on June 29 "it was further ordered," etc., and no money was turned in, but that statement is not an order. The meeting of June 29, R. 7, was a creditors' meeting under the original petition for composition or extension, still under Section 75 (a) to (r). The conciliation commissioner had no power to make such an order. Section 75 (a) to (r) for composition or extension affords an opportunity to submit a proposal to creditors, not to require the farmer debtor to pay his farm receipts into court. Thereafter on July 9 he was given fifteen days to file his amended petition under Section 75 (s). R. 7, entry of July 9. He filed it on July 19, R. 3, entry of July 19, and he was adjudicated a farmer debtor bankrupt on July 20, R. 3, entry of July 20. It was referred back to the conciliation commissioner on July 23, R. 8, entries of July 23.

As to rent and principal payments the amounts were absolutely impossible to pay out of an 80 acre 20 cow dairy farm.

The Citation on Page 17 of John Hancock v. Bartels, 308 U. S. 180.

No reason is apparent for this citation. The Bartels mortgage holder's allegations made to the district court

in its petition for dismissal are set out at page 182 of the Bartels opinion. Among them was one that farmer debtor Bartels' proposal was "apparently for the sole purpose of hindering and delaying his creditors." The district court granted the petition and dismissed the proceeding. This court reversed it saying, at page 183: "the District Judge failed to follow the mandate of the statute." At page 186 this court said: "The court is directed to stay all proceedings against the debtor or his property for three years, and during that time the debtor may retain possession". And at page 186 this court also said "the court may order any unexempt perishable property, . . . or any unexempt personal property **not reasonably necessary for the farming operations" to be sold.**

Reply to Respondents' Brief Page 17.

(Under Heading "B. Decision of District Court")

Bottom of Page 17, Citation of In re Madonia, 32 Fed. Supp. 165.

This is a decision of the district court below. The respondents' brief says of that case "It is clear leave was asked and extension granted." The reported opinion shows that no such leave was asked or granted. There were two petitions for review, but only the first is involved in the opinion and it was filed within ten days. No copy was served on the adverse party who moved to strike the petition for review for lack of notice. He relied upon Section 39 (c) which provides that an aggrieved person may **within ten days** "file with the referee a petition for review **and serve a copy upon the adverse parties.**" The referee granted the motion to strike and to his order a second petition for review was filed and a copy served, both within ten days after the order to strike.

It was argued that the provision for filing a petition for review and serving copies within ten days was jurisdictional and therefore the district judge had no power to hear the first petition for review because a copy was not served within ten days. (No copy had been served at any time). The opinion answered this argument thus: "I can not agree. Statutes granting a right of review of the order of the court should be liberally construed, so that if error occurs it may be corrected."

This demonstrates that the district court below in the *Madonia* case considered that it had jurisdiction to hear a petition for review not filed within ten days even though no application for extension of time was made.

The opinion was based on *Thummess* v. *Von Hoffman*, CCA 9 (1940) 109 Fed. (2d) 291, which is quoted at No. 53, page 40 of the petitioner's "Supplemental Brief" filed herein. As shown in the *Madonia* opinion and in the *Thummess* opinion, whether or not a petition for an extension of time is filed is immaterial. It is a question of power. The power is granted in Section 2 (10) of the Bankruptcy Act and (quoting from the *Thummess* opinion), "No question as to the jurisdiction of the bankruptcy court to entertain a petition for review is involved by Section 39, sub. (c)." The *Thummess* opinion thoroughly discusses the history of petitions for review and shows that in some jurisdictions there was no time set for filing. The formality of an application for extension is immaterial—the court still has *power* under Section 2 (10). Lack of an application could not destroy that *power*. But as the Sixth Circuit held in *Miller* v. *Hatfield*, CCA 6 (1940), 111 Fed. (2d) 28, a petition for rehearing made to a conciliation commissioner in itself extends the time for filing a petition for review of the order to which the petition for rehearing is directed. This *Miller* case is discussed and quoted at No. 33, pages 26 to 28 of the Supplemental

Brief. There the petition for rehearing was filed with the conciliation commissioner long after the ten days named in Section 39 (c) for filing a petition for review.

Near the middle of page 18 of respondents' brief is cited *In re L. & R. Wister and Company*, 237 Fed. 793, which is again cited, and quoted, at pages 30 and 31 of respondents' brief and this reply brief will discuss it under that page heading.

Reply to Respondents' Brief Page 18.

(Under Heading "C. The Opinion of Circuit Court of Appeals")

The farmer debtor has not abandoned his conception of the relation between Section 75 (s) and Section 39 (c) as to petitions for review. Section 75 (s) provides four months and Section 39 (c) provides ten days. As the definition of a "farmer" in Section 75 (r) overrides that in Section 1 (17) where there is a conflict, so Section 75 (s) overrides Section 39 (c) where they conflict.

Reply to Respondents' Brief Pages 19 and 20.

(Under the Heading "2. The petitions for rehearing filed herein were not sufficient to revive the right of review lost by failure to file such petition within the period prescribed by Section 39-C.")

The issue is whether an application for rehearing of an order must be made within time for appeal in order to suspend or destroy the finality of that order for the purpose of appeal.

The analysis of the twelve cases relied upon to support the opinion of the appellate court below (three were named and nine were lumped together as "analogous cases") is as correct as could be made. Where there is any doubt it was resolved in favor of the appellate court's opinion.

Contrary to the statement made in respondents' brief, in **four** of the twelve cases (two of which were directly cited in the opinion of the appellate court) the statements in the opinion of the appellate court below were incorrect in each instance. That is, in each of the four cases:

(1) The petition for rehearing was **not** granted;
(2) The old judgment was **not** vacated;
(3) A new judgment was **not** entered;
(4) And the petition for rehearing was **not** filed **within time** for appeal.

These four cases are:

(1) *Brockett* v. *Brockett* (1843), 43 U. S. (2 How.) 283.

(2) *Gypsy* v. *Escoe* (1927), 275 U. S. 498.

(3) *U. S.* v. *Seminole* (1937), 299 U. S. 417.

(4) *Bowman* v. *Lopereno* (1940), 311 U. S. 262.

Furthermore, to these four cases there should be added the following **two** which, out of caution, were listed "not stated" as to statement 4. (Petition for rehearing filed within time for appeal), namely:

(5) *Texas* v. *Murphy* (1844), 11 U. S. 487, in which, although it is not apparent when the application for rehearing was filed in relation to the time to seek a review, the opinion rested upon cases where the applications for rehearing were filed after time. See Case No. 52 at page 39 of the "Supplemental Brief" filed by the petitioner herein.

(6) *Citizens* v. *Opperman* (1919), 249 U. S. 488, which is also silent upon the point, but in which the opinion rested upon cases where the relative time element was ignored. In one of them, *Andrews* v. *Virginian* (1919), 248 U. S. 272, this court said the discretion of the court to deny petition for rehearing did not destroy the application of the rule as it depended upon the "*existence of the power*" to grant or deny rehearing which determined the finality of the order to which the application for rehearing was directed. In the other of the supporting cases, *Chicago* v. *Basham* (1919), 249 U. S. 163, this court said if a petition for rehearing "*is presented to, and entertained and considered by the court*" the order to which it is directed does not become final until the petition for rehearing is "*disposed of*". (These three cases are discussed and quoted in the petitioner's "Supplemental Brief" at: No. 14, page 12; No. 3, page 3, and No. 13, page 11).

So, in *six* of the twelve cases relied upon by the opinion of the appellate court below, that opinion is not supported.

But the subject merits further pursuit.

An examination of the **other six cases** cited in support of the opinion of the appellate court below shows that none of them lend any support whatever, for the reasons here stated:

Aspen v. *Billings* (1893), 150 U. S. 31. See No. 4, page 3 of the "Supplemental Brief" of the petitioner herein.

The petition for rehearing was filed within time for appeal and within term but disposed of by denial after term. The sole issue was whether carrying over to a

subsequent term destroyed the applicability of the rule. The court had terms and Equity Rule 88 provided that "no rehearing shall be granted after the term" in which the order was entered. This court held that the applicable rule was not affected for the petition for rehearing was filed in season and "**entertained by the court**" and Equity Rule 88 was "construed to mean that a rehearing can not be granted after the lapse of the term unless application is made therefor during the term, and being entertained the decree is thereby prevented from passing beyond the control of the court."

It is significant that in the following cases cited in *Aspen* v. *Billings* in support of the opinion, there was no requirement that the application for rehearing be within time for appeal:

Brockett v. *Brockett* (1843), 43 U. S. (2 How.) 283 (see No. 10, page 9 of "Supplemental Brief") where the petition for rehearing was filed after time for appeal.

Texas v. *Murphy* (1844), 111 U. S. 487 (see No. 52, page 39 of "Supplemental Brief") where it is not stated whether the petition for rehearing was filed before or after the time for appeal, but the opinion rested upon cases where the application was made after time.

Memphis v. *Brown* (1877), 94 U. S. (4 Otto.) 715, (see No. 32, page 26 of "Supplemental Brief") where *Brockett* v. *Brockett* (1844), 43 U. S. (2 How.) 238, is also cited

to support the opinion; and there the petition for rehearing was filed after time.

Goddard v. *Ordway*, (*Phillips* v. *Ordway*) (1880), 101 U. S. (11 Otto.) 745 (see No. 21, page 18 of "Supplemental Brief") where the application for rehearing was made after appeal was allowed, but within term, and held over and denied at a subsequent term. This court held that the application for rehearing was "made to and *recognized* by the court at the same term" and "entered on the minutes of the doings of the court." And that when what a paper calls for "appears on the minutes of actual proceedings, it must be presumed that the court, in some form, gave it judicial attention, and that it was presented in some regular way." (That is, the court thereby "*entertained*" the application for rehearing.) This court held that "The motion, when *entertained*, prolongs the suit, and keeps the parties in court until it is passed upon."

Another of the six cases is *Kingman* v. *Western* (1898), 170 U. S. 675 (see No. 30, page 24 of "Supplemental Brief").

Here the motion for a new trial was filed well within the time for appeal. But the opinion of this court cited in support of its opinion:

Aspen v. *Billings* (discussed above);

Brockett v. *Brockett* (discussed above), where the application for rehearing was filed after time to appeal.

Texas v. *Murphy* (discussed above), which relied upon cases where the application for rehearinfi was filed after time.

Memphis v. *Brown* (discussed above), where the application for rehearing was filed after time for appeal.

The next of the six cases is *United States* v. *Ellicott* (1912) 223 U. S. 524 (see No. 56, page 42 of "Supplemental Brief").

The sole issue, on a motion to dismiss on appeal, was whether a motion for new trial filed in term but overruled after term and appealed after the period for appeal from the original entry had expired extended the time for appeal. This court reiterated the rule and cited *Kingman* v. *Western* (which is discussed above) in its support.

Next of the six cases is *Morse* v. *United States* (1926), 270 U. S. 151 (see No. 35, page 29 of "Supplemental Brief").

The rule of the court of claims required **leave to file a motion for new trial** if it was to be filed after ninety days. One motion for new trial was filed within ninety days and denied. After ninety days two **applications for leave to file** a motion for new trial were denied. This court again restated the general rule that denial of an application for rehearing suspends the finality of an order to which it is directed, but it distinguished between an application for rehearing and **an application for leave to file** an application for rehearing to which, of course, the rule has no application.

In support of the general rule this court again cited numerous of its former opinions where the application

for rehearing was filed after time for appeal and held to stop the running of the time for appeal.

The next of the six cases is *Wayne* v. *Owens-Illinois* (1937), 300 U. S. 131 (see No. 62, page 46 of "Supplemental Brief").

At page 137 this court said (referring **to the power of courts of law and equity** to revise judgments) that such power was **limited by expiration of the term "and not by the period allowed for appeal."**

Then this court said: **"There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal."** (There being no terms in bankruptcy, it was held that the "term rule" had no application in a court of bankruptcy.)

At no place in the opinion did this court make it a requirement that (as happened to be the state of facts in this case), the formalities of granting a petition for rehearing, vacating the old judgment and entering a new judgment, must precede the adherence to the order as originally entered. On the contrary, in none of the cases cited in the opinion, and approved and followed, did such preliminaries exist. The decision did not require that all preceding and all following cases should involve the same procedural facts that there existed, before the rule could apply.

The next case of the six is a Circuit Court of Appeals opinion, *Carpenter* v. *Condor*, CCA 9 (1939), 108 Fed. (2d) 318, (see No. 12, page 11 of "Supplemental Brief").

Although the petition for rehearing was filed within time for appeal but overruled thereafter the court stated, and followed, the general rule, citing *Morse* v. *United States* (discussed above) where this court restated that rule and cited in its support many cases where the application for rehearing had been filed after time for appeal.

The last of the six cases is *Bowman* v. *Lopereno* (1940), 311 U. S. 262 (see No. 8A, page 7 of "Supplemental Brief").

In this involved case, a certain petition for rehearing was filed November 15, 1937, was filed long after the time for appeal. At page 266 of its opinion this court held that: "Treating . . . the petition of November 15, 1937, as a second **petition for rehearing filed out of time**" the time for taking appeal was enlarged.

In recapitulation of this discussion of the twelve cases which the opinion of the appellate court below held do not support the rule that an application for rehearing suspends the running of the time for appeal it may be said:

Four of the twelve cases involved facts where:

The petition for rehearing was **not** granted;
The old judgment was **not** vacated;
A new judgment was **not** entered;
And the application for rehearing was **not** filed **within time** for appeal.

Two of the twelve cases do not disclose the situation but:

The petition for rehearing was **not** granted;
The old judgment was **not** vacated;

A new judgment was **not** entered;

And as to the application for rehearing, the opinion does not disclose whether the application for rehearing was filed before or after time for appeal but the decisions were based upon earlier adherence to the rule where the application was **filed after time.**

The other six of the twelve cases all support the rule that an application for rehearing suspends the time for appeal from the order to which it relates, without regard to whether it was filed before or after the time for appeal.

Reply to Respondents' Brief Pages 21 to 27.

(Under the Heading: "3. The circuit Court's finding that the petitions for rehearing were filed for the mere purpose of extending the time for seeking review.")
A few points under this heading will be replied to.

For Mr. Coulson's authority and activities see:

Mr. Coulson's affidavit, R. 94 to 95.

Mr. Coulson's verification of Petition for emergency restraining order is noted at R. 34.

This verification covers the statement in the petition for emergency restraining order in paragraph 6 that the $12,750 rental and extra payment order was not presented to or approved by either the farmer debtor or his counsel.

Mr. Coulson's verification also pertains to the statement in the petition for emergency restraining order, paragraph 8 (R. 32), that on that date, September 17, 1940, no order to sell the cattle had been issued or entered.

Mr. Coulson's verification also relates to the petition for emergency restraining order, paragraph 10, that neither the farmer debtor nor his counsel consented or stipulated that any of the farmer debtor's personal property was perishable.

Mr. Dazey's affidavit showing his incapacity is at R. 34 to 35.

THE INCAPACITY OF COUNSEL.

During all of the times the proceeding was pending before the conciliation commissioner under Section 75(s) the farmer debtor's counsel, Mr. Dazey, was incapacitated. No other counsel was authorized to represent him. It was not until September 7 at the earliest that Mr. Dazey realized what was going on, and when he did he took measures to have the whole situation examined into. How respondents would think that an incapacitated man could protect his client's rights is not clear. At any rate they still claim the advantages they gained thereby. Under this unfortunate circumstance, evidently the respondents proceeded to "make hay while the sun shines". Upon a 20 cow dairy farm they got—upon their specific **motions made and granted the same day without notice**—a total of $12,750 rental and extra payments, ostensibly by authority of Section 75(s)(2), to be paid within 2 years, 8 months and 13 days. Then after a 25 day breathing spell they obtained authority from the conciliation commissioner to sell, as "perishable" the farmer debtor's cows, farm implements and crops. As soon as Dr. Dazey learned of the floundering proceeding it was halted. Authority for the foregoing statements. R. 34 to 35. R. 94 to 95. R. 30, paragraphs 6, 8, 10, Note of verification by Mr. Coulson at R. 34. R. 9,

entry of August 13. R. 72 to 76. R. 10, entry of September 7. R. 77 to 88. R. 146 to 147, paragraph 15.

Although the farmer debtor was without counsel, he should not have been without representation for 75(q) made it the sworn duty of the conciliation commissioner to protect the rights of the farmer debtor by assisting him. The conciliation commissioner seems to have administered the farmer debtor proceeding strictly as a **referee in bankruptcy** where the creditors control the proceeding and not under the farmer debtor statute which makes the conciliation commissioner the guardian of the rights of the farmer debtor under it.

Fortunately the creditors overreached their advantages and secured their orders without that due process of law which is necessary to make them valid.

Specifically referring to the statement in respondents' brief, at page 25 under heading "Sixth" that counsel for the farmer debtor "refers herein to his **inability**" to find the September 7 orders, counsel there repeated the factual statement in paragraph 3 at R. 90, that on September 12, 1940, "there **was then in said file no entry of September 7, 1940, ordering the sale of petitioner's chattels**".

A careful examination of the record discloses that the **"Orders of September 7, 1940"** were not in existence on September 7, 1940, when it is claimed they were entered, and did not exist until some time later. They came on the scene gradually and progressively. We will trace in the record these three orders of September 7, 1940 until they appear in their fully developed form at R. 77 to 88. We find them first in embryo.

1. R. 90, paragraph 3. Counsel for the petitioner here repeats the substance of the statement under the heading "Sixth" at page 28 of petitioner's brief and says that on September 12, 1940 (five days after the purported orders of September 7 were later said to have been entered) he (1) went to the office of the conciliation commissioner, (2) asked for the conciliation commissioner's docket and file in this cause, (3) copied every entry in the cause, (4) examined and made notes of or copied every paper in the file, "taking each paper separately therefrom and carefully reading it," (5) but there was then in the file no order of September 7, 1940, for the sale of the petitioner's chattels, and (6) there was nothing on the docket pertaining to such an order except the **docket entry of September 7** (which is copied in part in the next paragraph, and which appears in full at R. 10).

2. R. 32. At the top of R. 32 in the "Petition for Emergency Restraining Order" filed September 17, 1940, the conciliation commissioner's **docket entry** of September 7, 1940, relating to the allowance of the respondents' petitions to reclaim (now referred to as petitions to "sell") the chattels as "perishable" is copied in full. That entry concludes in these words: "prayer of petitions granted as per order (Dft)". Paragraph 8, R. 32 of the same "Petition for Emergency Restraining Order" recites that no order pursuant to the memorandum entry of September 7 had yet been issued or entered. Paragraph 9, R. 32, recites that the farmer debtor was informed and believed an order of sale was about to be issued. He had already filed a petition for rehearing of the order of August 13. (See R. 139). In paragraph 11 (R. 33), he averred that as

soon as an order of sale was issued he desired to obtain a rehearing or to file a petition for review thereof. In paragraph 12 (R. 33) he averred that it was necessary to restrain a sale until an order should first have been entered.

Mr. Coulson verified the statements made in this "Petition for Emergency Restraining Order". R. 34, top of page. Mr. U. G. Ward, an attorney, was present on September 7 at the hearing before the conciliation commissioner and says that an order was *to be prepared* (R. 108).

3. R. 10, entry of September 7. As just remarked, the memorandum on the conciliation commissioner's docket dated September 7, 1940, concludes as follows: . . . "prayer of petitions granted as per order (Dft". The interpretation of the parenthetical letters "(Dft)" is left to the reader. The respondents have not ventured to explain it. The original, and present, interpretation of counsel for the petitioner is that "(Dft)" is an abbreviation for "Draft" which in turn means "Let an order be drafted accordingly." It was not then done.

4. R. 35 to 40. At the hearing of the "Petition for Emergency Restraining Order" on September 19 (R. 3, last entry of September 19) **respondents presented their "Answer" which is pregnant with important negative evidence.**

In paragraph 8 (R. 38) of their answer they "aver that orders have been entered" on September 7. They do not clearly and unequivocably say "were" entered on September 7.

In paragraph 10 (R. 38 and 39) they say that "on the 13th day of **September** [August?] AD 1940" they appeared with witnesses but Mr. Coulson waived proof and stipu-

lated that the cattle were "perishable" under Section 75. They continue to say (which is important as well appear below): "Said commissioner so found **as will appear by his findings more fully set forth in his orders thereon, a copy of ONE of which is hereto attached and marked 'Exhibit B'** ". Now this "Exhibit B" appears in full at R. 40 and **it in no way recites any such "findings" by the conciliation commissioner.** It merely appoints an officer and directs him to sell on September 30, 1940. But when we go to the full fledged order at R. 79 and R. 87 to 88, we find that he orders the sale to be at a "date and hour to be selected by said officer" with "at least five days' prior" notice; while at R. 81 the sale is to be on "fifteen (15) days' notice".

In paragraph 11 (R. 39) of their "Answer" they say that "said **order** is entered **as of**" September 7. And at R. 97 to 105, as late as September 26, we find **the same respondents** (bottom of R. 39, bottom of R. 105) referring **five separate times to** "the **order**" or "said **order**" (R. 100 and 101, paragraphs 3 and 4. R. 103, paragraph 11). They still shy away from a flat statement that three orders were **entered on September 7** for we find them saying "said **order** prior to the time **same was** entered" and "**at the time of the signing** and entry hereof." R. 103, paragraph 11.

It appears significant that on September 19, before the District Court, and later on September 26, before the conciliation commissioner, the respondents would not categorically state that on September 7 three separate orders were entered and that they did not then and there produce the three orders but referred to one **order** and produced something quite different—their "Exhibit B" appointing an officer to **conduct** a sale. The **three orders**

when they appear in the record at R. 77 to 80; R. 80 to 82; and 82 to 88, were something else.

5. R. 88 to 97. All of the foregoing assumed additional significance when the farmer debtor's petition for rehearing of the orders of September 7, filed September 20, is examined. In paragraph 4, R. 90, it is stated that on September 19 (at the hearing in the District Court, R. 3, last entry of September 19), **the farmer debtor first learned what he had not theretofore known, namely that three orders** were involved. But even then he did not see them and it was necessary to file on September 23 an amendment (R. 95) to his petition for rehearing in which at paragraph 10 he referred to paragraph 4 (R. 90) of the petition for rehearing and said that he did not see said "orders" until **"ONE** of them" was **shown to the court** and not until then did he know **"its contents."** R. 96. As we know this must have been the interesting "Exhibit B" at R. 40, which turned out to be something different from the **THREE ORDERS** appearing in the record at R. 77 to 88.

6. Section 75(a) makes the conciliation commissioner a referee. Section 1(9) makes the referee the court. Rules of Civil Procedure, Rule 77, makes it the duty of the court immediately upon the entry of an order to serve notice and note the service on the docket. **This was not done.**

So right up to September 26 we find all parties referring to "an **order**" and that order was **"Exhibit B" at R. 40.**

It would seem pertinent to ask: Why were the three orders not produced on September 19 if they had been entered? Why was a different order produced as Exhibit B (R. 40) on September 19 if three other and different orders were entered on September 7? Why was th refer-

ence always to **an order** up to September 26. When the farmer debtor's pleadings repeatedly referred to an **order** why did the respondents not say "There was not one but three orders and here they are and were entered on September 7"?

The conclusion of the whole matter is that it can not be said that the record shows that these orders were entered and signed by the referee on the date of their entry in the presence of the farmer debtor. It is interesting to note the elusive statement in the second paragraph under heading "Sixth," page 25 of respondents' brief, that the conciliation commissioner "had all his books in court showing all the **docket entries**" (not the "**three orders**"). The record leaves it very doubtful, to state it lightly, whether the three orders of September 7 were entered on that date.

The Cases cited by Respondents' Brief at Pages 22 to 27 of Respondents' Brief.

At pages 22 and 24 is cited *Ott* v. *Thurston*, CCA 9 (1935) 76 Fed. (2d) 368. The opinion repeatedly excepts "*manifest errors*" which "*invoke the sense of justice,*" and so on. These we have here.

Lyon v. *The Perin*, 1889, 125 U. S. 839, cited in respondents' brief at page 21. Patent suit, regularly set for trial, came on for hearing and was submitted on pleadings. The court found and decreed that "the equities are with the defendant; that the bill be dismissed." The plaintiff brought another suit in another jurisdiction involving the same parties and the same subject matter. It was held the first suit was *res judicata*.

In re Brown, D. Ct., N. H. (1940), 35 Fed. Supp. 619, cited at page 27, has no bearing on this matter. It merely holds

that when a regular bankruptcy proceeding is abandoned by the bankrupt who later files a second petition, he may not receive a discharge.

Kyser v. *MacAdam*, CCA 2 (1941), 117 Fed. (2d) 232. This case preceded the Second Circuit's earlier decision in *In re Albert, Brooklyn* v. *Albert*, CCA 2 (1941), 122 Fed. (2d) 393, (see No. 1, page 2 of "Supplemental Brief") which is cited at pages 32, 40 and 45 of the preceding brief of the petitioner herein, as one of the numerous circuit court decisions with which the appellate court and the district court below are in conflict. The opinion in declining to dismiss the appeal said "The court below granted the review and passed on the merits. We see no occasion to do otherwise." The opinion cited the opinion of the district court below in *In re Madonia*, D. Ct. Ill. (1941), 32 Fed. Supp. 165 (see No. 21, page 24 of "Supplemental Brief") and *Thwmmess* v. *Von Hoffman*, CCA 3 (1940), 109 Fed. (2d) 291 (see No. 53, page 41 of "Supplemental Brief"), both of which support the petitioner's present contentions in this court.

McIntosh v. *U. S.*, CCA 4 (1934), 70 Fed. (2d) 507.

This is a minority decision following *Conboy* v. *First National* (1906), 203 U. S. 141, which is discussed later in this brief at page 30. It holds with the *Conboy* decision, and contrary to the late decision of this court in *Wayne* v. *Owens-Illinois* (1937), 300 U. S. 131, at page 137, that a petition for rehearing must be filed before the time for appeal has run.

Reply to Respondents' Brief Pages 27 to 29.

(Under the Heading "4. The Three Orders of September 7th, 1940, were 'consent orders' and not appealable.")

We do not believe that this suggestion is seriously relied on. We think it is lugged in as a desperate expedient. The answer runs through all that has already been said. But lest it might be considered that possibly some of the decisions brought forward by the respondents would countenance such a conclusion in the instant case we briefly discuss them.

Pacific Railroad v. *Ketchum* (1880), 101 U. S. 289, cited at page 28 of Respondents' brief. This court held that a consent decree is appealable saying, as to the argument to the contrary: "We do not so understand the law." The court then proceeded to find that the consent by a corporation through its elected solicitor to foreclose in a foreclosure action, not having been challenged in the court of first instance, could not be attacked on appeal. The farmer debtor Pfister strenuously challenged the claim of consent before the conciliation commissioner and in the district court, as shown by his petition for emergency restraining order, R. 27, and his two petitions for rehearing. R. 88 and R. 139.

U. S. v. *Babbitt* (1882) 104 U. S. 14 (Otto) 767, cited at page 28 of respondents' brief. An army officer sued for longevity pay claiming his cadet service should be counted. The court of claims in its opinion held *contra* but the United States Attorney General consented to a judgment in favor of the officer. This court held the consent was binding. There was raised no question of the authority of the Attorney General to bind the United

States. The appeal was not dismissed, the judgment was affirmed.

Curry v. *Curry*, CCA DC (1935), 79 Fed. (2d) 172, page 28 of respondents' Brief. Divorce case. Wife through counsel entered into a separation agreement and obtained a decree. After paying the stipulated and awarded alimony for a long time the divorced husband, who had remarried, became financially embarrased and could not pay, whereupon the wife brought suit to annul the divorce and the separation agreement in order to bring criminal action. The court held she had irrevocably ratified the separation agreement and the divorce. Mr. Pfister ratified nothing. His counsel did not even have any of the orders presented before entry.

Bergman v. *Rhoades*, 1929, 334 Ill. 143, also cited at pages 28 and 29 of respondents' brief. In the settlement of an estate legatees by counsel agreed to take land instead of money because it was found that a money settlement was impracticable. Their fully authorized counsel who had represented them for years participated in the agreement, the report and the application to the court. There was no disability and no lack of authority or knowledge.

Union Central v. *Anderson*, 1937, 291 Ill. 423, cited at page 29 of respondents' brief. In mortgage foreclosure the mortgagee gave notice of appeal and then proposed settlement. It secretly instructed its counsel to abandon

appeal and "watch for expiration of time". A written stipulation was drawn by counsel and the mortgagee kept it until one day after the mortgagor's time for appeal expired, and then refused to sign it, leaving the foreclosure naked. The mortgagor brought suit to cancel the mortgage alleging a trap by the mortgagee. The mortgagee was held to the stipulations made by its counsel, invoking "equitable estoppel". It said "Appellant makes reference in its brief to cases of authority and precedent, but none where the circumstances are such as exist in this case. The court can not permit its judgment, orders and decrees to thus be made the object of a designing litigant . . . Precedent can not thus be permitted to embalm principle."

The pronouncement is commended to respondents.

American v. *Industrial*, 1929, 235 Ill. 332, cited in respondents' brief at page 29. Industrial compensation case. Controversy by employer over name of widow, whether it was Mrs. Hupka or Mrs. Kupka. Throughout the case she was "Mrs. Kupka" without objection by the employer who so referred to her in cross interrogatories. After judgment the employer urged that the identity of "Mrs. Kupka" was not established. The court held it was estopped.

Reply to Respondents' Brief Pages 29 to 31.

(Under the Heading "5. The point that the District Court 'had no power' to hear the petitions for review.")

In re Wister, CCA 3, 1916, 237 Fed. 793. As already shown the Third Circuit is in the majority in holding that a petition for rehearing may be filed after a rule-fixed time

for filing. This Wister decision does not depart from its earlier and later decisions. The facts of the case set it apart. Creditor W filed a petition for review and eight months later joined with the trustee "praying that the proceedings be dismissed and the order of the referee be affirmed." Creditor S then filed an application to intervene, praying that W's petition for review be not dismissed and that he be allowed to intervene as if he had filed a petition for review. That is S *never filed any petition for review.* The application was denied. This was what he lost "by his own neglect" to file any petition for review.

In re David, CCA 3, 1929, 33 Fed. (2d) 748, cited at page 31 of respondents' brief.

This decision does not relate to the statutory provision of Section 39(c) of the Bankruptcy Act which did not then exist. It relates to a petition for a writ of certiorari which the appellate court denied. The Third Circuit is in accord with the general rule that a rule of court limiting time within which to file a petition for review is not jurisdictional. In fact its later decision in *Roberts Auto Supply v. Dattle*, CCA 3, 44 Fed. (2d) 159, is sometimes cited as a leading case on the subject.

The Third Circuit is, in principle, another circuit with which the decision below conflicts—although its decisions so far reported have been on the former rule of court and not on Section 39(c) which incorporates the rule.

In re Greek (D. Ct. Pa.), 164 Fed. 211, and *In re Marks* (D. Ct. Pa.) 171 Fed. 281, cited in the quotation of the

foregoing citation, are both Pennsylvania cases in which by express rule of the local court a petition for review had to be filed within ten days *unless the judge afterwards allowed it to be filed*, thus expressly recognizing the jurisdiction of the court to hear reviews where the petition was filed after time.

Reply to Respondents' Brief Pages 32 to 35.

(Under the heading "D. Discussion *re* Authorities on Specification of Errors.")

Reply to the respondents' statement at pages 33 to 34 that "The entire proceedings were not considered by the conciliation commissioner."

The "entire proceeding" was "considered." See: R. 13, entry of November 28, 1940. "Referee's opinion and decision on Petition for Rehearing and amendment thereto of the Order of August 13, 1940," R. 158 to 164, and the "Referee's opinion and decision on Petition for Rehearing of Orders of September 7, 1940." R. 109 to 116. These all show that the two petitions for rehearing were entertained and thoroughly considered by the court on their merits.

Reply to Respondents' Brief Pages 36 to 41.

(Under Heading "I. Section 39C and Not Section 75S of the Bankruptcy Act governs the time for filing petitions for review of the orders of Referee in farmer-debtor cases.")

The provision in Section 75 (s), first and unnumbered paragraph reads "Provided, **That in proceedings under this section, either party may file objections, exceptions**

and take appeals within four months from the date the referee approves the appraisal." It does not say in proceedings under this **subsection.** Section 75 in subsections (a) to (s) inclusive.

The appraisal was approved August 13, 1940. See R. 69. Four months thereafter expired December 13, 1940. 69. Four months thereafter expired December 13, 1940. By latter date, that is, without the four months period, every and appeals in the bankruptcy court. Specifically: the petition for review of the orders of September 7, 1940, was filed October 9, 1940, or **within two months;** and the petition for review of the order of August 13, 1940, was filed November 28, 1940, that is within **three months and two weeks.** Both were well within the four months period.

Now this provision in Section 75(s) means something or it means nothing. Like Section 75(r) it means what it says.

Reply to Respondents' Brief Pages 41 to 48.

(Under the Heading "Petitioner not having filed any petition for review within the time prescribed by Section 39C, and having lost his right to review thereunder, did not revive that right by the subsequent filing of the petitions for re-hearing of the orders of August 13, 1940 and September 7, 1940.")

Credit Company v. *Arkansas*, (1888), 128 U. S. 258.

An appeal was not filed in the Circuit Court within two years as required by law. To remedy the defect the Circuit Court **after the two years had elapsed** put on a *nunc pro tunc* order stating that it should bear a date previous to the expiration of the two years.

The quoted portion of the opinion was directed to that situation which has no relevancy to the issues here pending.

Discussion of Cases Cited and Discussed by Respondents' Brief.

Respondents' Brief Pages 43 to 44.

Conboy v. *First National Bank*, (1906), 203 U. S. 141.

Case cited and discussed at pages 43 and 44 of respondents' brief. This case involved a question of substantive bankruptcy law.

The decision has been thoroughly analyzed in petitioner's "Supplemental Brief," number 16, page 13. Four observations are pertinent to respondents' claims concerning it.

(1) Its internal structure is weak and lacks consistency. Five out of eight cases are inconsistent with the statement it makes concerning them. See "Supplemental Brief," No. 16, lower half of page 13 and page 14, where this subject is analyzed.

(2) We are not concerned with an appeal from a denial of a petition for rehearing, but with an appeal from the original order.

(3) This court in *Wayne* v. *Owens-Illinois*, 1937, 300 U. S. 131, 133, especially cited it in No. 2, as being indecisive and adhered to the two decisive decisions of (1) *West* v. *McLaughlin*, CCA 6, 1908, (discussed in the "Supplemental Brief" at page 52, number 64, and (2) *Cameron* v. *National*, CCA 8, 1921, 272 Fed. 874 (discussed in the "Supplemental Brief" at page 10, number 11).

(4) The *Conboy* decision is 36 years old and this court **has cited it only four times in cases heard by it and has never followed it.**

The *first time* the *Conboy* decision was cited: *Harrison* v. *Magoon*, 1907, 205 U. S. 501. The *Conboy* case grew out of bankruptcy. This *Harrison* case involved (1) a judgment of a Hawaiian territorial court and (2) the applicability of an Act relating to appeals from that territory which was enacted after the original judgment was rendered. The opinion at page 503 remarked: "No doubt the decisions cited and others show that **where a right to take the case up exists at the time of the original judgment, the time limited for the writ of error or appeal does not begin to run until the petition for rehearing is disposed of.**" It was held that the territorial judgment act not being existent when the original judgment was rendered a petition for rehearing could not make such a subsequent act applicable. In passing the opinion observed that the general rule had been limited as to bankruptcy cases by the *Conboy* decision. This court expressly made it apply to bankruptcy law in *Wayne* v. *Owens-Illinois*, 300 U. S. 131. See Supplemental brief, page 46, case number 62.

The *second time* the *Conboy* decision was cited: *Old Nick* v. *U. S.*, 1910, 215 U. S. 541. Verdict and judgment in federal court for violation of alcohol tax, motion to vacate and for new trial overruled. Writ of error not issued within six months as required by statute, whereupon the court entered an order reciting that a writ of error was "issued and served *nunc pro tunc* as within" the statutory six months. This court held that a mere *nunc pro tunc* order did not cure non-compliance. Again the opinion remarked, *obiter dicta*, that in bankruptcy a petition for rehearing filed after time for appeal did not save the appeal which was held otherwise in *Wayne* v. *Owens-Illinois*, as stated above.

The *third time* the *Conboy* decision was cited: *Zimmern* v. *U. S.*, 1936, 298 U. S. 167. Suit to set aside deed and to

make real estate subject to income tax. The judgment court extended the term to allow time for modifying its judgment. This court held that the court had control over its judgment within the extended term and reversed the appellate court for dismissing the appeal. The opinion merely remarked, as an aside, that a petition for rehearing was filed "when the time for appeal had already gone by if the original decision was then presently in force. *Cf. Conboy* v. *First Nat. Bank*, 203 U. S. 141, 145."

The *fourth time* the *Conboy* decision was cited: *Wayne* v. *Owens-Illinois*, 300 U. S. 131, 133, note 2: "This court had averted to the question without deciding it," (citing the *Conboy* decision), and then proceeded to "decide it" adversely to *Conboy*.

It is of importance to note that in contrast to the *Conboy* decision of thirty-six years ago which has never been followed by this court in any case heard by it, the *Wayne* v. *Owens-Illinois* decision decided five years ago has been followed without question by the lower federal courts. Shepard's Citations contains more than 40 lower federal court references to it.

Respondents' Brief page 44.

Wayne v. *Owens-Illinois*, 300 U. S. 131. This decision has been discussed at No. 62, page 48 of "Supplemental Brief" herein.

Respondents' Brief page 44.

Bowman v. *Lopereno*, 1940, 311 U. S. 262. It is sufficient to refer to the quotation from page 266 of the opinion which is quoted at No. 8A, page 8 of the "Supplemental Brief," namely: "Treating . . . The petition of No-

vember 15, 1937, as *a second petition for rehearing FILED OUT OF TIME*" . . . "*These circumstances enlarged the time for taking appeal*". . . .

Respondents' Brief page 45.

Gypsy v. *Escoe*, 1927, 275 U. S. 498.

It is true that a petition for rehearing was filed within time (three months) for applying for certiorari and denied, within time, on June 14. But as the court said, "On September 30, 1927, **more than three months after denial** of the petition for rehearing (June 14), **the present petition for certiorari was filed.**"

It is true that on June 18, still within time, an application for **leave to file** a second petition for rehearing was filed, and later, denied after time. But an application for **leave to file** an application for rehearing **is not the filing of a petition for rehearing** and does not have the effect of one. This court said that "the mere presentation of a motion **for leave to file**" does not have the effect of suspending the time for seeking a review.

This court went on to suggest to the petitioner how, within the applicable long established rule of law, another application for certiorari could be seasonably filed. It said that if **leave to file a second petition for rehearing** was granted and the **petition** was actually **entertained, "then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition" for rehearing.**

This court was but repeating the distinction it had already clearly explained in *Morse* v. *United States*, 1926, 270 U. S. 151, at page 153, as noted in petitioner's "Supplemental Brief," No. 35, page 29, at page 30, last paragraph, in the discussion of that opinion. The quotation on the point is at the top of page 30 of the supplemental brief.

Where a court actually **entertains a petition for rehearing** without expressly granting **leave to file** such leave is conclusively presumed. See *Aspen* v. *Billings*, 1893, 15 U. S. 31, quoted in this point in the discussion of the case in petitioner's "Supplemental Brief," No. 4, page 3, at the top of page 5. Counsel does not have access to the official paging of the decision but it is at 37 L. Ed., page 988, lower half of second column preceding paragraph numbered 3. See also *Kingman* v. *Western*, 1898, 170 U. S. 675 at page 678. The applicable quotation on this point is copied into the discussion of the case in petitioner's "Supplemental Brief at number 29, page 23, in the middle of the larger quotation in the middle of page 24.

Respondents' Brief Page 45

Morse v. *United States* (1926), 270 U. S. 151, discussed at No. 35, page 29 of "Supplemental Brief" herein. This case distinguished between a *petition for rehearing* and *a motion for leave to file* a petition for rehearing, exactly as did *Gypsy* v. *Escoe*. In the *Morse* case this court carefully explained that the long established rule that a petition for rehearing of an order suspended the finality of that order for the purposes of appeal was not affected by holding that a motion for leave to file a petition for rehearing did not have the same effect. In its discussion this court referred to the cases cited on the upper part of page 46 by respondents' brief. All these cases are discussed in the "Supplemental Brief" herein as follows: (They are in the order as they appear in respondents' brief.)

Andrews v. *Virginian*, 248 U. S. 272, No. 3, page 3;
Aspen v. *Billings*, 150 U. S. 31, No. 4, page 3;
Chicago v. *Basham*, 249 U. S. 164, No. 13, page 11;
Kingman v. *Western*, 170 U. S. 675, No. 30, page 24;

Memphis v. *Brown*, 94 U. S. (4 Otto) 715, No. 32, page 26;
Texas v. *Murphy*, 111 U. S. 488, No. 52, page 39;
United States v. *Ellicott*, 223 U. S. 524, No. 56, page 42;
Washington v. *Bradley*, 19 L. Ed. 894, No. 61, page 46;
Brockett v. *Brockett*, 2 How. 238, 11 L. Ed. 251, No. 10, page 9;

Respondents' Brief Pages 46 and 47.

Chapman v. *Federal*, CCA 6 (1941), 117 Fed. (2d) 321.

It is evident that the author of respondents' brief has misread the facts in this case so they will be related. The farmer debtor died leaving as heirs her two sons and her surviving spouse, their father, who was appointed administrator. The constitutionality of the provision of Section 75(r) that the term "farmer" . . . "includes the personal representative of a deceased farmer" has not been determined by this court. Consequently two farmer debtor petitions were contemporaneously filed, one by the administrator, and another by the heirs, the administrator being himself the sole petitioner in one case and joining individually with his two sons in the other. Creditors attacked both petitions for "lack of good faith" and "impossibility of rehabilitation" and the District Court dismissed both cases.

As the constitutionality of the provision of Section 75(r) giving the administrator the right to file as a farmer debtor had not been attacked in the district court that subject was deemed waived and only the dismissal of the administrator's proceeding was appealed. After the appeal was briefed by the appellant this court decided *John Hancock* v. *Bartels*, 308 U. S. 180, holding that farmer debtor proceedings may not be dismissed for "lack of good faith" or "impossibility of rehabilitation" thus leaving the dismissal by the District Court without a leg to stand on. The appellee obtained an extension of time to plead and, abandoning every argument previously advanced, attacked the appeal upon the sole ground that a farmer debtor proceeding by an administrator is unconstitutional and moved for dismissal of the appeal.

The appellant countered by obtaining leave to go back into the district court to file a petition for rehearing upon the basis of the *Bartels* decision. In the district court petitions for rehearing were then filed in both cases. Both were denied whereupon the heirs' case was also appealed making two pending appeals which were consolidated.

The appellate court held the administrator's proceeding was rightly brought under Section 75(r), thus leaving the heirs' case of no moment whatever except as an encumbrance on the docket. The opinion was by a new judge just appointed. One judge died prior to the decision and did not participate in it. The third judge took occasion to "concur in the opinion". The opinion as to the heirs' proceeding relied upon *Mintz* v. *Lester*, CCA 10, 1938, 95 Fed. (2d) 590, (discussed hereafter at page 38 of this reply brief) where the appeal was from the dismissal of a **petition for rehearing**, and other similar weak appellate decisions. It quoted (at page 324) from *Conboy* v. *First National Bank* (1906), 203 U. S. 141, as follows. Page 324: "No appeal lies from orders denying petitions for rehearing". It held that the heirs' petition for rehearing was not "seasonably" filed (having been filed after seven months).

The petitions for rehearing in this pending *Pfister* case were filed within two weeks and five weeks respectively, both being filed shortly after counsel discovered what had

occurred. R. 9, entry of August 13. R. 10 entries of September 7 and 16. R. 11 entry of September 20. R. 27 to 34. R. 34 to 35. R. 89 and 90, paragraphs 2 and 3. R. 144, paragraphs 7, 8 and 9. R. 146, bottom of page and top of R. 147.

The significance of *Chapman* v. *Federal*, CCA 6, 1941, 117 Fed. (2d) 321, is the following quotation from it: "But **where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial,** and the appeal runs from the date thereof" citing *Wayne* v. *Owens-Illinois*, 300 U. S. 131; *Voorhees* v. *John T. Noye*, 151 U. S. 131; *Gypsy* v. *Escoe*, 275 U. S. 498. Thus putting the Chapman heirs' decision solely on its interpretation of "seasonable" and "entertain" and "consideration on the merits". In this pending *Pfister* case the conciliation commissioner himself denied motions to dismiss the petitions for rehearing and therefore "entertained" them and reported that he fully considered the "entire proceeding". See petitioner's brief, page 9, "Petitions for Rehearing and Their Denial."

The Chapman opinion lends no aid to the respondents' argument. The facts and the procedure differ widely from the present pending case.

The List of Cases Cited by Respondents' Brief But not discussed, at page 47.

Chicago M. & St. P. R. R. Co. v. *Leverentz* (1927), (CCA 8), 19 Fed. (2d) 915;

McIntosh v. *U. S.* (1934), CCA 4, 70 Fed. (2d) 507;

Northwestern, etc. v. *Pfeifer*, (1929), CCA 8, 36 Fed. (2d) 5;

Larkin Packing Co. v. *Hinderliter* (1932), CCA 10, 60 Fed. (2d) 491.

These four cases will be discussed in one group.

They were not bankruptcy cases but civil suits. In the first three cases time for filing error was three months. In each of these three cases a motion for new trial was filed within term but after three months and denied. Consequently each writ of error or appeal was taken more than three months thereafter.

The court in each of the three decisions held that if an application for a new trial or for rehearing is not filed within the period for seeking a review, it is lost. This was expressly disapproved and repudiated by this court in *Wayne* v. *Owens-Illinois*, 1936, 300 U. S. 131, at 137, saying "courts of law and equity have such power, limited by the expiration of the term at which the judgment or decision was entered and not by the period allowed for appeal, or by the fact that an appeal has been perfected," citing in Notes 9 and 8 some of the decisions of this court already relied upon by the petititon. This decision, when rendered was with the minority, and is utterly repudiated.

The fourth case, *Larken* v. *Hinderliter*, CCA 10, 1932, 60 Fed. (2d) 491, was slightly different but sympathetic with the other three. Appeal time was thirty days and the court held that an informal application for a slight correction of a judgment was not an application for rehearing.

Clarke v. *Hot Springs*, CCA 10, 1935, 76 Fed. (2d) 918. This is an obiter dicta opinion that a petition for rehearing to be seasonable must be filed "within the time for

appeal". The court held in *Wayne* v. *Owens-Illinois*, 300 U. S. 131, 137 that the power of a court to entertain a petition for rehearing "is limited by the expiration of the term . . . and **not by the period allowed for appeal**". This court there further held that in bankruptcy there are no terms and therefore that right is not limited by the expiration of the term. The appellate court in the *Clarke* v. *Hot Springs* case did not dismiss the appeals—there were four of them which they decided on the merits.

Mintz v. *Lester*, CCA 10, 1938, 95 Fed. (2d) 590. This decision accords with the universal rule that the denial of an application for rehearing is discretionary and not appealable. Appellant Mintz appealed from an order "denying her motion for a rehearing." The motion for rehearing was denied May 20; the appeal was from that order and no other. The last sentence of the opinion is: "It follows that the appeal was improvidently granted and it is therefore dismissed. The distinction was clearly and concisely worded in *In re Jayrose*, CCA 2, 1937, 93 Fed. 471, quoted in "Supplemental Brief," number 28 at pages 22 and 23, and cited in the petition at page 40 as one of the Circuit decisions with which the decision below is in conflict.

International v. *Cary*, CCA 6, 1917, 240 Fed. 101. This Sixth Circuit decision is sandwiched between its prior decision in *West* v. *McLaughlin*, CCA 6, 1908, 162 Fed. 124, 125, and its later decision in *Miller* v. *Hatfield*, CCA 6, 1940, 111 Fed. (2d) 28 at 32, both holding that a petition for review may be filed after the period fixed by rule of court. This decision was distinguished by the Sixth Circuit in *Miller* v. *Hatfield* at page 33, saying "This conclusion is not in conflict with *International Agr. Corp.* v. *Cary, supra.*" This is true because the original order had already been considered on a petition for review and re-

versed. Two years later another petition for review was filed and dismissed.

In re Albert; Brooklyn v. *Albert*, CCA 2, 1941, 122 Fed. (2d) 393. This is one of the decisions cited as showing that the decision below is in conflict with that of other circuits. Petition page 19 "In the Second Circuit", it holds that Section 39 is not a statute of limitation, and does not limit Section 2 (10) and also that "The jurisdiction of the bankruptcy court when invoked by the filing of the petition continues until the estate is closed." It upholds the contention of the petition for certiorari.

In re David (1929), CCA 3, 33 Fed. (2d) 748, has already been discussed at page 28 of this reply brief.

In re Wister (1916), CCA 3, 237 Fed. 793. This case has also been discussed previously in this reply brief at page 27.

Reply to Respondents' Brief Pages 48 to 54.

(Under Headings:

Page 48: "III. Petition for rehearing have been filed merely for the purpose of attempting to revive and extend the right to review, District Court correctly dismissed such petitions for review."

Page 49: "IV. Order of September 7, 1940, are consent orders. No appeal or review thereof by petition for review can be had therefrom."

Page 54: "V. Order of August 13, 1940 is a consent order. No appeal or review by petitioin for review can be had thereunder.")

The foregoing matters are repetitions of preceding parts of the respondents' brief and this reply brief will not go over them again. Nearly all of the cases cited were cited once or several times before and were replied to in this reply brief.

Clemens v. *Gregg* (California), 1917, 167 Pac. 294. After acting upon a consent decree in the settlement of a foreclosure action by making payments for four years one party objected. It was held the consent decree had been fully ratified.

Respectfully submitted,

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Lima, Ohio
October 13, 1942.